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Can the ICC Ever Get it Right?

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Can the ICC Ever Get it Right?

Abstract

Nesrine Malik makes clear with her title, "The ICC's Blunder on Sudan," that something has gone amiss with the efforts of Prosecutor Luis Moreno-Ocampo to ensure the ICC statute is applied to those circumstances it was meant to address. But why is something amiss in this situation? The Prosecutor has a mandate and the legal regime for the ICC is relatively clear (at least procedurally); the crimes it covers can always be debated, but there is a degree of clarity present as to what acts are addressed; so what has gone wrong? The difficulty lies in expectations about justice and about the use of international law to pursue justice. If the Prosecutor publicly stated that he felt it would be counter-productive to take action regarding accusations of genocide in Sudan, his office would be criticized. Whether the Prosecutor does or does not take action, there is criticism. So, can the ICC ever get it right? The quick answer is, probably not. Someone will always have a reason (and usually a defensible reason) to criticize the ICC and its institutions for acting or not acting.

Keywords

Human rights, Darfur, International Criminal Court (ICC), Sudan, War crimes

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Can the ICC Ever Get it Right?

by Richard Burchill

Nesrine Malik makes clear with her title, “The ICC’s Blunder on Sudan,” that something has gone amiss with the efforts of Prosecutor Luis Moreno-Ocampo to ensure the ICC statute is applied to those circumstances it was meant to address. But why is something amiss in this situation? The Prosecutor has a mandate and the legal regime for the ICC is relatively clear (at least procedurally); the crimes it covers can always be debated, but there is a degree of clarity present as to what acts are addressed; so what has gone wrong? The difficulty lies in expectations about justice and about the use of international law to pursue justice. If the Prosecutor publicly stated that he felt it would be counter-productive to take action regarding accusations of genocide in Sudan, his office would be criticized. Whether the Prosecutor does or does not take action, there is criticism. So, can the ICC ever get it right? The quick answer is, probably not. Someone will always have a reason (and usually a defensible reason) to criticize the ICC and its institutions for acting or not acting.

This is a major issue facing not just the ICC, but international institutions generally, especially those designed to deal with matters of justice. There is a tendency to place a great deal of confidence in the ability of international law and institutions to deliver a better world; this is the reason they are established. At the same time international law and institutions are subject to changing views and priorities as to what is necessary for making the world a better place. In this context the debate over the effectiveness of institutions like the ICC will persist. The creation of international law is a political process and the outcomes achieved are the results of political negotiations, deals, and agreements. This is not necessarily a fundamental weakness, just the reality we have to face, and it means things are unlikely to ever satisfy all those concerned.

The ICC is the archetypal example of the tensions that result when action is taken to address a matter many believe has to be dealt with through international law. Often, those efforts may be seen as conflicting with other priorities. The story of where we are today when it comes to bringing those responsible for international crimes to justice is well known. The atrocities of World War II had to be acted upon through the creation of a system for international criminal responsibility; but this was a one-off event, and the political and strategic priorities of the Cold War displaced any urgency for further action. Then, with the end of the Cold War, events in the former Yugoslavia and Rwanda required a response from the international community, which decided to set up tribunals to deal with issues of international criminal responsibility. Of course, there are plenty of things that could be criticized regarding the effectiveness and how international justice was being implemented. But a trend was now in place, and more efforts were made to ensure that those responsible for abhorrent acts would be brought to justice. However, the tension between peace and justice remained.

The Rome Statute of the International Criminal Court entered into force in 2002. At the time, the Secretary-General of the United Nations [heralded](#) the Statute as an historic occasion, as it would deliver on “the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States are unable or unwilling to bring them to justice.” “No more impunity” became the mantra of those seeking peace and justice in the world. But the Statute is only an addition to the existing international system. It did not

recreate that system, meaning it has to compete with existing tensions and difficulties. The ICC does not create a global cop; rather, the Statute is an international treaty that provides specific mechanisms for action and defines when action can occur. If any matter falls outside of the Statute, it may be unjust or even regrettable, but it is not a failing of the ICC. But even when the ICC does appear to work—i.e. there is evidence of actions covered by the Statute, a prosecutor issues an indictment, and procedures are followed—there is much worrying that, perhaps at this particular stage, the time is not right, or the circumstances are not appropriate for the ICC to be involved.

The Prosecutor is trapped in this dilemma. Malik puts forth a valid point about Moreno-Ocampo grandstanding on the genocide charges. There are currently arrest warrants in place for Bashir regarding accusations of war crimes and crimes against humanity. Why pursue the charge of genocide? There are two ways of looking at this. The Prosecutor is mandated to seek justice for the victims of crimes covered by the Statute, and [has argued](#) that this is a primary factor in pursuing the genocide charge. So how can we be critical of such a standard? Malik explains that, due to the “international indifference” regarding the existing arrest warrants for Bashir, the Prosecutor has “a desire to flex muscles in the knowledge that it is unlikely Bashir will ever be tried.” This is possibly an accurate assessment, but the pursuit of the genocide charge by the Prosecutor is also justified in law. The ICC Statute covers the crime of genocide and there is sufficient evidence for the Prosecutor to undertake an investigation. If the Prosecutor ignored this evidence and did not act within the requirements of the Statute, it is likely criticisms would be levelled at Moreno-Ocampo.

At the same time, the ICC has already taken a major step in obtaining arrest warrants for Bashir concerning allegations of crimes against humanity and war crimes. These are the first warrants granted for a sitting head of state, and the first to come through the Security Council’s role in the ICC structure. What else may be gained by pursuing a further warrant for genocide? I can understand the normative arguments, but can the expenditure of time and resources be justified? There are many substantive responses to this question, such as ensuring deterrence, upholding justice, and removing impunity, all of which are agreeable; but would it not be better to focus on the existing warrants and to make every effort to ensure they are acted upon?

This is where Malik has identified the real problem regarding Sudan—the inability of the international community to effectively support the ICC. Bashir is travelling freely, so clearly there is no political pressure being exerted by the Security Council requiring states to support the ICC’s efforts. The recent meetings in Qatar attended by Bashir appear to be heading towards the signing of a cease-fire agreement between Bashir’s government and the largest opposition group, which is to be welcomed. However, is this limited step toward peace worth undermining the pursuit of justice? The matter is further complicated by reports that representatives of the United States and the United Nations will [be attending](#) the signing of the peace agreement, a gesture that will clearly undermine the Security Council’s responsibility for upholding both peace and security. The United States cannot justify its presence by not being party to the Statute, as it is a member of the Security Council, i.e. the body that called for the Prosecutor to become involved in the first place. Equally, the United Nations cannot attempt to play multiple roles by justifying its presence as supporting both peace and justice.

This situation shows exactly what the ICC is about and what it is meant to do. It also shows the limits and realities we must face if the court is ever to be effective. But the issue is not with the Prosecutor; Moreno-Ocampo is doing the job he was given. If we think he is going too far, or does not have his priorities in line, that is our opinion. But would it not be equally critical if he did not do his job?

Dr. Richard Burchill is the Director of the McCoubrey Centre for International Law, School of Law, University of Hull. His research interests cover the promotion and protection of democracy in international law including human rights protection. He is the author of Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee, 2nd ed. (2009, with Alex Conte) and the editor of Democracy and International Law: Library of Essays in International Law (2006) and has published widely in international journals and edited collections.